Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ELOISE BLOUNTT,

Petitioner,

v.

DANIEL R. GLICKMAN, Secretary of United States Department of Agriculture, and UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the United States Court of Appeals for the Seventh Circuit erroneously found that Petitioner did not create a genuine issue of material fact concerning her pretextual termination.

II. Whether the United States Court of Appeals for the Seventh Circuit erroneously found that the MSPB decision adverse to Blountt was not arbitrary, capricious, an abuse of discretion, or unsupported by substantial evidence.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully asks this Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review that court's judgment and opinion entered on March 16, 1999.

OPINIONS BELOW

The March 16, 1999 decision of the United States Court of Appeals for the Seventh Circuit is not published, and is reprinted in the appendix to this petition. The opinion of the District Court for the Northern District of Illinois, Eastern Division, Civil No. 96 C 6295 is not published, but can be found at 1998 U.S. Dist. Lexis 9177 (N.D. Ill.) and is reprinted in the appendix to this petition.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered its judgment on March 16, 1999. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF CASE

The United States District Court for the Northern District of Illinois asserted jurisdiction under 42 U.S.C. § 2000e *et seq.*, 29 U.S.C. § 633, 791, 5 U.S.C. § 7703(b)(2) and 42 U.S.C. § 1331. The United States Court of Appeals for the Seventh Circuit Court of Appeals asserted jurisdiction pursuant to 28 U.S.C. § 1291.

Petitioner, Eloise Blountt, ("BLOUNTT"), was hired by the Respondent, The United States Department of Agriculture, ("USDA"). BLOUNTT was initially employed as a secretary and was subsequently promoted to the position of Food Program Specialist in 1992. She received exemplary performance evaluations throughout her employment with the USDA, and was promoted to various grades of pay. BLOUNTT's attendance was excellent until March, 1995.

From 1993 through 1995, BLOUNTT was frequently criticized and harassed by her two supervisors, Carla McGill Yearby, ("Yearby"), and Colleen Borjas, ("Borjas"). Yearby and Borjas gave BLOUNTT conflicting orders, including, on one occasion, when certain assignments should be completed. When BLOUNTT tried to explain the situation, Borjas screamed at her. BLOUNTT was often expected to do the work of two employees, when co-workers felt that they were being overworked.

In March, 1995, following a conflict with her supervisor, BLOUNTT took her annual leave on March 9 and 10, and then sick leave from March 13 to 16. During this time, BLOUNTT was examined and treated by Dr. Waverly Clanton, for stress related symptoms. On March 14, 1995, Dr. Clanton sent a letter to the USDA explaining that BLOUNTT was under his care for anxiety attacks and severe stress. Dr. Clanton also explained that BLOUNTT was suffering from insomnia, loss of appetite, and high blood pressure. He also noted that BLOUNTT's medical problems were "primarily" job related. BLOUNTT's doctor recommended that she take an indefinite leave of absence and possibly undergo psychiatric counseling. Accordingly, BLOUNTT submit-

ted several requests for unpaid leave because of her condition between March and June, 1995.

On March 21, the USDA wrote Dr. Clanton and requested additional information regarding BLOUNTT's request for leave. Dr. Clanton did not respond, so the USDA then sent follow-up correspondence on April 13, 1995, requesting that Dr. Clanton comply. Dr. Clanton never responded to the USDA's request, nor did he return BLOUNTT's telephone calls. The USDA granted BLOUNTT leave until April 16, 1995. Finally, in late April, 1995, Dr. Clanton's office called BLOUNTT and told her that they would not be providing any more medical documentation. BLOUNTT then changed her request from paid sick leave to leave without pay, ("LWOP").

On April 24, 1995, BLOUNTT filed a grievance against the USDA, complaining of "abuse and harassment" and "discrimination." On May 1, 1995, Sandra Slayton, ("Slayton"), Petitioner's supervisor, responded by letter, charging her with away without leave status, ("AWOL"), because she allegedly failed to submit adequate medical documentation.

Subsequently, on May 8, 1995, BLOUNTT filed an informal charge of discrimination with Respondent's Equal Employment Opportunity ("EEO") Counselor, Travis Jones. BLOUNTT also registered her complaints with Mike Sherman at the Office of Civil Rights, verbally on May 17, 1995, and then subsequently by writing on May 22, 1995.

Two days later, on May 24, 1995, Slayton proposed BLOUNTT's termination on the basis that she was AWOL. On May 26, 1999, Jim Fruge, ("Fruge"), the

USDA's regional manager, learned from the Office of Civil Rights Enforcement that BLOUNTT complained of discrimination on the basis of her medical condition.

On June 15, 1995, BLOUNTT advised the USDA that she was seeing a psychiatrist, Dr. Gerson Kaplan, and that Dr. Kaplan would provide her employer with a medical note. Fruge called Dr. Kaplan and requested that he send a note by June 23. Thereafter, on June 21, 1995, Dr. Kaplan sent a letter advising the USDA that he was treating BLOUNTT for a "depressive order with anxiety." Dr. Kaplan found that her symptoms included insomnia, severe anxiety, loss of appetite and weight, and a feeling of hopelessness. He further stated that BLOUNTT would be undergoing weekly psychotherapy sessions and that she planned to return to work on June 26, 1995. Dr. Kaplan ultimately recommended that BLOUNTT be transferred to a different position.

At the MSPB hearing, Slayton conceded that Dr. Kaplan's report contained all of the information that she had requested, and that Dr. Clanton's earlier letter was sufficient to justify BLOUNTT's medical leave for March and April, 1995.

On June 26, 1995, the date that BLOUNTT was scheduled to return to work, and only after Dr. Kaplan submitted his medical report, Thomas Pate, a USDA administrator, decided to terminate BLOUNTT allegedly for her AWOL status. Pate stated that he came to this decision because: (1) BLOUNTT allegedly failed to report to work from April 17 to June 23 without being granted leave; (2) BLOUNTT purportedly failed to establish valid reasons for her absence as required under federal regulations; and (3) her alleged failure to cooperate with her supervisors to determine her status.

BLOUNTT challenged the decision to terminate her with the MSPB, arguing that her termination was not justified. The MSPB found in favor of the USDA. BLOUNTT then appealed to the EEOC, which affirmed the administrative agency's ruling. BLOUNTT then filed a complaint in the United States District Court for the Northern District of Illinois, where she alleged handicap discrimination, retaliation, and requested review of the MSPB decision. The district court granted summary judgment in favor of the USDA, and BLOUNTT appealed. The United States Court of Appeals for the Seventh Circuit affirmed the district court's ruling.

Petitioner, Eloise Blountt, now seeks a writ of certiorari from this Court to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

REASONS FOR GRANTING THE WRIT

I.

Certiorari Should Be Granted Because The United States Court Of Appeals For The Seventh Circuit Erroneously Found That Petitioner Did Not Create A Genuine Issue Of Material Fact Concerning Her Pretextual Termination.

In its opinion, the Seventh Circuit Court of Appeals did not address whether BLOUNTT established a *prima facie* case of retaliation; rather, it assumed that she did. The court went on to hold that the USDA had articulated a non-retaliatory reason for BLOUNTT's termination, and held that BLOUNTT failed to establish pretext. Since BLOUNTT properly raised a genuine issue of material fact, the writ of certiorari should be granted.

In the case sub judice, BLOUNTT submitted reports from two physicians—Dr. Clanton and Dr. Kaplan. As requested, Dr. Kaplan submitted his report prior to the USDA's deadline. It contained detailed findings, a prognosis, and a recommended plan for BLOUNTT's return to work—that she work under another supervisor. At the hearing, Slayton conceded that both Dr. Clanton's note and Dr. Kaplan's report had provided sufficient information.

A plaintiff can prove that an employer's proferred reasons for an employment decision are pretextual by one of two methods: (1) by showing that a discriminatory reason more likely motivated the employer; or (2) by showing that the employer's proferred explanation is unworthy of credence. *Konowitz v. Schnadig Corp.*, 965 F.2d 230, 232 (7th Cir. 1992). For summary judgment purposes, the non-moving party must only produce evidence from which a rational trier of fact could infer that the employer lied about its preferred reasons for discharge. *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1124 (7th Cir. 1994); *Shager v. Upjohn Co.*, 913 F.2d 398, 401 (7th Cir. 1990). To prove pretext, the plaintiff must present evidence that the employer "made up" its reason for the discharge. *Castleman v. Acme Boot Co.*, 959 F.2d 586, 588 (7th Cir. 1992). A grant of summary judgment which turns on the issue of discriminatory intent should be approached with special caution. *Courtney v. Biosound, Inc.*, 42 F.3d 414 (7th Cir. 1994).

Why would the USDA have afforded Dr. Kaplan until June 23, 1995 to furnish a report, which he did, and then disregard it, and terminate BLOUNTT? Clearly, the USDA intended to terminate BLOUNTT regardless

of whether Dr. Kaplan submitted a report at all, and regardless of his findings and prognosis. If, in fact, the USDA had a legitimate non-retaliatory reason for terminating BLOUNTT, why did it even bother requesting a report from Dr. Kaplan? While Slayton testified at the hearing that she wished the report would have been submitted earlier, clearly, Dr. Kaplan furnished the requested information in a timely manner—*prior* to the USDA's deadline. In light of BLOUNTT's prior exemplary work record, and the extraordinarily suspect act of terminating BLOUNTT immediately after Dr. Kaplan submitted a detailed medical report, BLOUNTT has certainly raised a genuine issue of material fact as to the USDA's intent. Consequently, the United States Court of Appeals for the Seventh Circuit's opinion and judgment affirming the United States District Court for the Northern District of Illinois granting the USDA summary judgment on BLOUNTT's retaliation claim, should be reversed. *Castleman v. Acme Boot Co.*, 959 F.2d 586, 588 (7th Cir. 1992); *Courtney v. Biosound, Inc.*, 42 F.3d 414 (7th Cir. 1994).

Certiorari should be granted so that BLOUNTT's retaliation claim may be properly reviewed.

II.

Certiorari Should Be Granted Because The United States Court Of Appeals For The Seventh Circuit Erroneously Found That The MSPB Decision Adverse To Blountt Was Not Arbitrary, Capricious, An Abuse Of Discretion, Or Unsupported By Substantial Evidence.

In the instant case, BLOUNTT was originally under the care and treatment of Dr. Clanton. Dr. Clanton at

first submitted a report concerning his treatment of BLOUNTT, but later became uncooperative, despite BLOUNTT's numerous attempts to provide the USDA with additional documentation. At that time, BLOUNTT sought to change her work status from sick leave to leave without pay. BLOUNTT then sought the care and treatment of Dr. Kaplan, who timely provided the USDA with the requested medical information.

At the MSPB hearing, Dr. Kaplan unequivocally testified that BLOUNTT was psychologically bereft of cooperating more with the USDA than she had. Dr. Kaplan found that BLOUNTT's severe symptoms made her unable to answer the USDA's repeated threats and demands for more detailed medical information.

Under the arbitrary and capricious standard, the court must weigh numerous factors: the impartiality of the decisionmaking body, the complexity of the issues, the process afforded the parties, the extent to which the decisionmakers utilized the assistance of experts where necessary, and finally, the soundness of the fiduciary's ratiocination. *Chalmers v. Quaker Oats Co.*, 61 F.3d 1340, 1344 (7th Cir. 1995). Under the arbitrary and capricious standard, the scope of the Seventh Circuit Court of Appeals' review was required to be "searching and careful." *Bowman Transportation v. Arkansas-Best Freight System*, 419 U.S. 281, 285 (1974). The agency must articulate a rational connection between the facts found and the choices made. *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962).

The MSPB's decision upholding the USDA's right to terminate BLOUNTT on the basis of her alleged AWOL status was clearly arbitrary, capricious, an abuse of

discretion, and unsupported by substantial evidence. As requested, Dr. Kaplan did timely provide a detailed medical report concerning BLOUNTT. Further, at the administrative hearing, BLOUNTT's treating physician testified that BLOUNTT could do no more in providing information to the USDA. In light of the timely provided medical information, and BLOUNTT's medically diagnosed inability to further comply, The United States Court Of Appeals For The Seventh Circuit's judgment and opinion finding that the MSPB's decision, upholding BLOUNTT's termination, should be reversed.

CONCLUSION

For the aforementioned reasons, Petitioner, Eloise Blountt, respectfully prays that this Honorable Court grant *Certiorari*, reverse The United States Court Of Appeals For The Seventh Circuit, and remand for further proceedings.

Respectfully submitted,

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 98-2732

ELOISE BLOUNTT,

Plaintiff-Appellant,

v.

DANIEL R. GLICKMAN, Secretary of
United States Department of Agriculture,
and UNITED STATES DEPARTMENT
OF AGRICULTURE,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 96 C 6295—**George W. Lindberg**, *Judge*.

SUBMITTED MARCH 2, 1999[1]—DECIDED MARCH 16, 1999

Before CUDAHY and ESCHBACH and COFFEY, *Circuit Judges*.

Eloise Blountt claims that her former employer, the United States Department of Agriculture ("the Department") wrongfully terminated her. Blountt challenges

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[1] On February 12, 1999 we granted the parties' request to waive oral argument. Thus, the appeal is submitted on the briefs and the record. *See* Fed. R. App. P. 34(f).

the adequacy of the reasons given by the Department for her termination and asserts that the Department in fact terminated her in retaliation for certain complaints she voiced about Department discrimination against her on the basis of her medical condition. That condition, Blountt claims, rendered her disabled. The district court granted the Department summary judgment, finding no reason to doubt either the sincerity or propriety of the Department's given reasons for terminating Blountt. Because the district court did not err in reaching this conclusion, we affirm.

Background

From 1990 when she began at the Department, up until the spring of 1995, Blountt appears to have been a good employee, who performed her job well and had an excellent attendance record. Blountt, however, believed that she was overworked and that her supervisors mistreated her. In March 1995, following a conflict with her acting supervisor, Blountt took annual leave on March 9 and March 10, and then sick leave from March 13 to March 16. The doctor treated Blountt for anxiety attacks and severe stress, and recommended indefinite leave of absence and possibly psychiatric counseling. Heeding her doctor's advice, Blountt continued to stay away from work at the Department. Blountt did, however, work as a substitute teacher for the Chicago Board of Education during this period of time.

On March 21, the Department wrote to Dr. Clanton and asked for additional information regarding Blountt's request for leave. Dr. Clanton did not respond to the Department's letter. The Department then wrote

to Blountt on April 13, and asked her to provide the necessary documentation. In the letter, the Department granted her leave until April 16, but added that no additional leave would be granted until she submitted the appropriate documentation. The Department gave her a deadline of April 27 to submit the documentation and indicated that failure to comply would result in absence without leave ("AWOL") status, which could lead to disciplinary action.

In response, on April 24, 1995, Blountt requested leave without pay from April 7 to June 24, giving four reasons for her request: (1) the denial of a job transfer she requested in 1994; (2) ongoing abuse and harassment from supervisors; (3) "discrimination"; and (4) pressure from supervisors due to a shortage of staff. The letter did not provide any additional medical documentation. Accordingly, the Department informed Blountt in a letter dated May 1, 1995, that she was being charged AWOL as of April 17, 1995, because she had not submitted adequate documentation to support her request for medical leave or leave without pay. After hearing nothing further from Blountt, one of Blountt's supervisors, Sandra Slayton, proposed that Blountt be terminated. A letter dated May 24, 1995, informed Blountt of the proposal and cited "excessive absence without leave ("AWOL")" as the reason. Two days later, Jim Fruge, the Department's regional personnel manager, learned from the Office of Civil Rights Enforcement that Blountt had complained of discrimination directed against her on the basis of her medical condition.

Blountt finally contacted the Department on June 15, 1995, informing them that she was now seeing a

psychiatrist, Dr. Gerson Kaplan, and that Dr. Kaplan would provide the Department with a medical note. Fruge called Dr. Kaplan and asked that he send the note by June 23. Accordingly, Dr. Kaplan sent a letter dated June 21, 1995, which stated that Blountt was under his care for treatment of a "depressive disorder with anxiety." He also stated Blountt would be seeing him for weekly psychotherapy sessions and that she planned to return to work on June 26, 1995.

On June 26, however, Thomas Pate, the relevant Department administrator, decided to terminate Blountt for excessive absence without leave. Pate cited as reasons for his decision: (1) Blountt's failure to report to work April 17 to June 23, 1995, without being granted leave; (2) her failure to establish valid reasons for her absence as required under federal regulations; and (3) her refusal to cooperate with her supervisors to determine her status. Blountt challenged her termination before the Merit Systems Protection Board ("MSPB"). The administrative judge affirmed Blountt's termination, finding that the Department was justified in removing her. Blountt appealed to the EEOC, which concurred with the MSPB. Blountt then filed suit in federal court, alleging that the Department did not reasonably accommodate her psychiatric problems, in violation of the Rehabilitation Act, 29 U.S.C. Sect. 794, and that it retaliated against her for complaining about discrimination, in violation of Title VII of the 1964 Civil Rights Act, 42 U.S.C. Sect. 2000e-16. She also asked the district court to reverse the MSPB's decision concerning the propriety of her termination. The district court granted summary judgment to the Department on all Blountt's claims. Blountt now appeals,

but only with respect to her retaliation claim and her request that the MSPB decision be reversed.

Analysis

We review a district court's grant of summary judgment *de novo*, construing the evidence and the inferences drawn from it in the light most favorable to the non-moving party. *See Curran v. Kwon*, 153 F.3d 481, 485 (7th Cir. 1998). Summary judgment is appropriate where there is no genuine issue of material fact such that judgment is proper as a matter of law. *See id.* (citing Fed. R. Civ. P. 56(c)).

I. Retaliation

Title VII prohibits employers, including the federal government, from discriminating against an employee because that employee has engaged in a "protected activity," such as complaining about discrimination or participating in an EEOC investigation. *See* 42 U.S.C. Sect. 2000e-3(a), *Hale v. Marsh*, 808 F.2d 616, 619 (7th Cir. 1986). The familiar *McDonnell Douglas* burden-shifting framework governs retaliation claims. To prove a prima facie case of retaliation a plaintiff must establish that "(1) she engaged in statutorily protected expression; (2) she suffered an adverse action by her employer, and (3) there is a causal link between the protected expression and the adverse action." *Knox v. Indiana*, 93 F.3d 1327, 1333-34 (7th Cir. 1996). If she makes that showing, the employer must articulate a legitimate, non-retaliatory reason for its actions, and once it does so, the burden shifts back to the plaintiff

to show that the proffered reasons are pretextual. *Id.* at 1334.

The parties dispute whether Blountt has established her prima facie case, but we decline to resolve this dispute. Instead, because the Department has met its burden of articulating legitimate, non-retaliatory reasons for Blountt's termination, we proceed directly to the issue of whether Blountt has created a genuine issue of fact concerning pretext. *See Chiaromonte v. Fashion Bed Group, Inc.*, 129 F.3d 391, 398 (7th Cir. 1997). Blountt tries to demonstrate pretext in two ways.

First, she argues that the note Dr. Kaplan ultimately provided was both adequate and timely, belying the Department's claims to the contrary. But, the evidence Blountt offers is insufficient to suggest that the reasons given for terminating her were pretextual. She points to a statement by Sandra Slayton in which she contends Slayton admitted that Dr. Kaplan's letter was adequate. This contention mischaracterizes the record, however, Slayton's statement concerns the adequacy of Kaplan's letter in explaining the leave Blountt was granted in March and the first part of April, not her subsequent absences. Beyond Slayton's statement, Blountt has nothing else to suggest that the Department is lying when it claims that Dr. Kaplan's letter was inadequate to justify her absences. As for the timeliness of the requested medical documentation, Blountt cannot dispute that she did not submit the requested information by the first deadline she was given, April 27, nor for almost two months afterwards. Thus, even though her doctor did comply with the Department's later request to submit documentation by

June 23, the Department is not being untruthful when it asserts that it terminated her because she did not submit the requested documentation in a timely manner.

Second, Blountt contends that her exemplary pre-March 1995 record indicates that the Department's reasons for terminating her could not have been legitimate. This argument, however, defies logic and settled case law. It is undisputed that after the first week of March 1995, Blountt's attendance, and for that matter her performance, deteriorated markedly. As the case law emphasizes, only an employee's performance at the time of discharge is relevant to the pretext inquiry. *See Hong v. Children's Mem'l Hosp.*, 993 F.2d 1257, 1262 (7th Cir. 1993).

In sum, Blountt had failed to raise a genuine issue of fact regarding the sincerity of the Department's reasons for terminating her. Accordingly, the district court properly granted the Department summary judgment on Blountt's retaliation claim.

II. Merit Systems Protection Board Decision

Blountt also challenges the MSPB's decision to uphold her termination.[2] Specifically, she takes issue with the Board's finding that the Department had proven that it

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[2] Ordinarily the Court of Appeals for the Federal Circuit has exclusive jurisdiction over appeals from the MSPB, but where the case also involves employment discrimination claims, federal district courts have jurisdiction to consider the MSPB appeal. *See Randle v. Bentsen*, 19 F.3d 371, 374 (7th Cir. 1994), *Williams v. Department of Army*, 715 F.2d 1485 (Fed. Cir. 1983) (en banc).

properly charged Blountt as being absent without leave.[3] *See Staten v. U.S. Postal Service,* 26 M.S.P.R. 206, 208 (1985) (describing standards of proof in AWOL case). We will overturn the MSPB's decision only if it is "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. Sect. 7703(c). *See Carr v. Reno,* 23 F.3d 525, 530 (D.C. Cir. 1994); *Maulding v. Sullivan,* 961 F.2d 694, 698-99 (8th Cir. 1992).

Blountt supports her contention that the Department was not entitled to charge her as being AWOL by arguing that the medical documentation she submitted was adequate and timely and that she was psychologically unable to respond more fully. With respect to the adequacy and timeliness of the medical documentation submitted, Blountt makes the same arguments she raised in her effort to establish pretext. As noted above, these arguments are unpersuasive. Blountt's second argument, that she was psychologically unable to respond to the Department's requests for documentation, suffers from similar problems. As noted by the MSPB, Blountt's medical evidence does not support such a contention and Blountt's work as a substitute teacher during the period of her absence, in fact, contradicts her claim. In short, we cannot say that the

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[3] Blountt appears to also challenge the MSPB's retaliation finding. Her challenge to this finding, however, is superseded by her Title VII retaliation claim, pursuant to the statute governing judicial review of MSPB decisions. 5 U.S.C. Sect. 7703(b)(2).

MSPB's decision requires reversal under 5 U.S.C. Sect. 7703(c).

Because Blountt has neither created an issue of genuine fact concerning her retaliation claim nor established that the MSPB's decision requires reversal, we conclude that the district court properly granted the Department summary judgment. Accordingly, we AFFIRM.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

ELOISE BLOUNTT, Plaintiff,

v.

DAN GLICKMAN, as Secretary of the United States Department of Agriculture, Defendant.

No. 96 C 6295

United States District Court, N.D. Illinois

June 9, 1998

MEMORANDUM OPINION AND ORDER

LINDBERG, District J.

Plaintiff, Eloise Blountt, brought this action against the United States Department of Agriculture (the Agency), alleging violations of Title VII and the Rehabilitation Act and seeking review of a decision from the Merit Systems Protection Board (MSPB) that affirmed her termination. Blountt claims that the Agency discriminated against her when it refused to grant her the reasonable accommodation of a job transfer and terminated her for being away from work without authorization, despite the depression and severe stress she was experiencing. She also brings a claim of retaliation for protected activity under Title VII. The Agency moves for summary judgment. For the following reasons, the court grants defendant's motion.

I. BACKGROUND

Blountt began working with the Agency in 1990 as a secretary in the Food and Consumer Service Division. In November 1992, she received a promotion to program specialist. Until a replacement for the secretarial position was hired in February 1993, Blountt performed the duties of both positions. She subsequently received two more salary increases. Because the positions Blountt occupied were trainee positions, she received assistance from her supervisor and other program specialists. Blountt received good performance evaluations throughout her employment and had an excellent attendance record. Plaintiff enumerates numerous complaints with the way she was treated while working as a program specialist, including having too much work to do, performing as much work as employees at higher GS levels, having other employees' work assigned to her, not receiving recognition for her work as other employees did, receiving conflicting assignments from her supervisors, and having supervisors shout at her and criticize her. In March 1994, plaintiff filed a grievance against her supervisor, Carla McGill-Yearby, alleging mistreatment and seeking reassignment to another supervisor. Plaintiff was told that to transfer, she must approach another program director directly. Plaintiff did so once during the following year but was not qualified for the position. Plaintiff complains of "discriminatory acts" and an "abusive environment" dating back to 1992, although she was not diagnosed or treated for depression until 1995 and she does not specify what type of discrimination motivated those acts.

In March 1995, plaintiff experienced a deadline conflict when she received assignments from both McGill-

Yearby, who was out on maternity leave at the time, and the acting supervisor Colleen Borjas. Borjas instructed plaintiff to put aside the project McGill-Yearby had assigned and work on Borjas' project instead. Plaintiff continued working on the McGill-Yearby project. Following this conflict, plaintiff stated that she was experiencing extreme stress and took annual leave from March 9 to March 10, and sick leave from March 13 to March 16. This latter leave was approved with the understanding that plaintiff would provide a doctor's note.

Plaintiff visited Dr. Waverly Clanton on March 11, 1995. Three days later, on March 14, Dr. Clanton sent a letter to the Agency stating in full:

> "This letter is to certify that Ms. Eloise Blountt is under my care for anxiety attacks and severe stress, primarily job related, which adversely affects her blood pressure. She also suffers from insomnia and loss of appetite. My recommendation is an indefinite leave of absence and possibly psychiatric counseling. If you need additional information, please contact my office."

From March 9 to April 16, 1995, plaintiff used 213 hours of sick leave and annual leave. In a March 21, 1995, letter to Dr. Clanton, the Agency requested additional information regarding Blountt's request for leave, including its expected duration, the treatment she was receiving and how her symptoms were related to the workplace. Dr. Clanton did not respond to the Agency's letter. The Agency then sent a letter to Blountt on April 13, 1995, advising her that her doctor had not responded to Agency requests for medical documentation regarding her condition. The letter also stated:

> "an employee seeking extended leave for medical reasons must provide more than a limited, open-ended statement from a doctor. Because the information provided earlier did not answer these questions and the prognosis of your medical situation is undefined, a medical certificate is being requested before any further leave or unpaid leave status is granted."

The Agency granted Blountt additional leave from April 2 to April 16 so that she could provide the requested information. It stated that no additional leave would be granted without such documentation and gave Blountt a deadline of April 27, 1995, to submit it. The Agency also informed Blountt that failure to comply would result in absence without leave (AWOL) status, which could lead to disciplinary action.

On April 24, 1995, Blountt responded to the Agency's request for additional information in a letter that requested leave without pay from April 7 to June 24, 1995, for the following reasons:

1) her March 1994 request to transfer was denied;
2) ongoing abuse and harassment from supervisors in FDP;
3) discrimination; and
4) pressure from supervisors due to shortness of staff in FDP.

No other explanation of these complaints was included in the letter. In addition, Blountt stated that "information contained in my medical file is considered confidential and would be an invasion of privacy for my doctor to publicize. My statement of release from my doctor will be submitted to you on my return of June 26,

1995." Blountt provided no additional medical documentation with this letter.

In response, the Agency informed Blountt in a letter dated May 1, 1995, that she was being charged AWOL as of April 17, 1995, because she had not submitted adequate documentation to support medical leave or leave without pay. An additional letter to Blountt dated May 24, 1995, provided "official notice of proposal to remove you from your position as Program Specialist, GS-301-09, and as an employee of the Food and Consumer Service (FCS), United States Department of Agriculture (USDA)" for "excessive absence without leave (AWOL)." Sandra Slayton, director of the food distribution program, made the proposal to terminate Blountt. On May 26, 1995, Jim Fruge, the Agency's regional personnel manager, learned from Mike Sherman, an employee at the Office of Civil Rights Enforcement, that plaintiff had made an informal complaint of discrimination with him on May 17, 1995, and followed that with a letter regarding her complaints on May 22, 1995.[1]

The Agency received a letter dated June 21, 1995, from Dr. Gerson Kaplan, which stated that Blountt was under his care for treatment of a depressive disorder with anxiety. Blountt first saw Dr. Kaplan on June 13,

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[1] On approximately May 8, 1995, before she contacted the Kansas City office, Blountt contacted Travis Jones, financial management specialist, who was responsible for the EEO duties for the Food and Consumer Service. Because these EEO duties were being discontinued in May 1995, Jones referred Blountt to the Kansas City office. He did not conduct an investigation or speak with anyone at the Agency regarding Blountt's complaint.

1995, and again on June 20, 1995. Dr. Kaplan listed Blountt's symptoms as "insomnia, poor appetite with loss of weight, feeling blue, a sense of being trapped, severe anxiety, hopelessness, an inability to enjoy life and a feeling of worthlessness." He also stated that Blountt would be seeing him for weekly psychotherapy sessions and that she planned to return to work on June 26, 1995. Dr. Kaplan indicated that "the precipitating factor in her illness was stress at her job" and recommended that Blountt be transferred to a new program instead of returning to her previous position.

During her career with the Agency, Blountt also worked as a substitute teacher for the Chicago Board of Education, using annual leave or accumulated flex time to take days off. When Blountt was on leave and AWOL from the Agency, she continued to work as a substitute teacher. Blountt was also able to clothe herself, take care of her personal hygiene and go grocery shopping during her leave from the Agency.

Thomas Pate, the Midwest region's deputy regional administrator, notified Blountt in a letter dated June 26, 1995, of his decision to uphold the proposal to terminate her effective June 30, 1995, for excessive absence without leave. He based this decision on: 1) her failure to report to work April 17 to June 23, 1995, without being granted leave; 2) her failure to establish valid reasons for her absence as required under federal regulations; and 3) her refusal to cooperate with her supervisors to determine her status. Blountt apparently returned to the office on June 26, 1995, and was escorted from the office. She subsequently filed for unemployment benefits, which the Illinois Department of Em-

ployment Security denied. Blountt challenged her termination with the U.S. Merit Systems Protection Board (MSPB), which held a hearing to determine whether the Agency properly denied plaintiff's requests for leave. The administrative judge affirmed the plaintiff's termination, finding that the Agency properly denied her requests for leave. Blountt then filed a charge with the EEOC, which issued a right to sue letter in August 1996. Blountt then filed the instant suit, alleging refusal to provide a reasonable accommodation and retaliation for protected activity. She also seeks reversal of the MSPB decision. Defendant has moved for summary judgment as to all counts.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The court must believe the evidence of the non-moving party and construe the evidence in that party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

"The plain language of rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). However, the party with the burden of proof on an issue may not rest

on its pleadings and must make affirmative factual allegations to demonstrate that a genuine issue of material fact exists. *Id.* at 324. Sufficient evidence that favors the non-moving party must exist before a triable issue can be found. *Anderson*, 477 U.S. at 249.

III. DISABILITY DISCRIMINATION

The Agency moves for summary judgment on several grounds. First, it asserts that many of plaintiff's allegations of discrimination-including complaints that she had too much work to do, performed as much work as employees at higher GS levels and had other employees' work assigned to her—do not amount to adverse actions and are therefore not actionable. Only plaintiff's termination qualifies as an adverse action. The Agency also moves to strike plaintiff's allegations that predate 1995 because by plaintiff's own admission, her symptoms of depression did not begin before March 1995 and any employment action that occurred before that date could therefore not be based on or related to her alleged disability.

Although this assessment of the evidence has merit, the court finds it more expedient to address another of defendant's points first. To establish a prima facie case of disability discrimination, plaintiff must establish that she has a disability as defined by the Rehabilitation Act and the Americans with Disabilities Act.[2] To

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[2] The court will cite interchangeably to cases interpreting the Americans with Disabilities Act and the Rehabilitation Act, as the two statutes are "materially identical." *Bryant v. Madigan*, 84 F.3d 246, 248 (7th Cir. 1996), *rehearing denied*, 91 F.3d 994 (1996).

do so, plaintiff must show either that: 1) she has a physical or mental impairment that substantially limits a major life activity; 2) she has a record of such an impairment; or 3) she is regarded as having such an impairment. 29 U.S.C. § 706(8)(B); 29 C.F.R. § 1614.203 (a). Plaintiff's allegations that she was unable to function effectively in life because of her depression indicate that she is attempting to establish a disability under the first prong of the definition.

Defendant asserts that plaintiff cannot establish a disability because she was not substantially limited in any major life activity, which includes activities such as "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." 29 C.F.R. § 1614.203(a)(3). As plaintiff testified that she was able to care for herself, get dressed, go grocery shopping and work as a substitute teacher during the time she alleges she experienced depression, the Agency argues that she cannot establish that she has a disability as defined by the statute.

In response, plaintiff claims that she was "unable to function effectively in life and unable to function in any capacity when dealing with the Department of Agriculture." She maintains that her ability to work as a substitute teacher did not mean that she was medically able to return to work at the Agency and that her teaching provided a "vital source of therapy for her emotional stability."

While plaintiff repeatedly states that she was unable to function, she submits no evidence to support this contention and actually testified to the contrary. *See Slowiak v. Land O'Lakes, Inc.*, 987 F.2d 1293, 1295

(7th Cir. 1993) (self-serving statements without factual support will not defeat a motion for summary judgment). Plaintiff stated that she continued to care for herself and perform ordinary tasks such as grocery shopping during the time she was on leave or AWOL from the Agency. Her teaching job indicates that plaintiff was able to work in a demanding position during this time.[3] Indeed, plaintiff herself-as indicated above-admits that the only activity she could not perform during her leave was her job at the Department of Agriculture. Dr. Clanton's letter to the Agency indicated that plaintiff's severe stress was primarily job related. Plaintiff's April 24, 1995, letter to the Agency requested leave without pay for a number of reasons, none of which related to her depression or any other medical condition. Finally, Dr. Kaplan's letter indicated that "the precipitating factor in [plaintiff's] illness was stress at her job" and recommended that she be transferred to a new program instead of returning to her previous position.[4]

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[3] Although plaintiff characterizes her work for the Chicago Board of Education as a "vital source of therapy," she has submitted no medical documentation to support her assertion that her position as a substitute teacher was prescribed therapy of any kind.

[4] This case is strikingly similar to one counsel previously argued before this court. *See* Minute Order entered June 19, 1996, in *Burwell v. Department of Children and Family Services*, 95 C 5221, dismissing plaintiff's claim under the Americans with Disabilities Act because the inability to work for a specific supervisor did not constitute a disability "even if it causes severe stress . . . because it does not substantially limit the ability to work" (citing *Palmer, supra; Weiler v. Household Finance Corp.*, 723 F.Supp. 1531 (N.D.Ill. 1994), *aff'd*, 101 F.3d 519 (7th Cir. 1996)).

The inability to work for a specific supervisor or in a specific job does not substantially limit the major life activity of working because it does not "significantly restrict [ ] the ability to perform either a class of jobs or a broad range of jobs in various classes." 29 C.F.R. § 1630.2(j)(3). *See Palmer v. Circuit Court of Cook County,* 905 F.Supp. 499, 507-08 (N.D.Ill. 1995*), aff'd,* 117 F.3d 351 (7th Cir. 1997), *cert. denied,* 118 S.Ct. 893 (1998) (noting that courts have "uniformly rejected the notion that inability to work at a particular position renders a person disabled under the ADA."). In addition to plaintiff's own testimony that she worked as a substitute teacher during her absence from the Agency, the court reads Dr. Clanton's and Dr. Kaplan's letters as clearly stating that plaintiff's condition was related to her specific position and her supervisors, and that plaintiff was able to perform in different positions for different supervisors. Because plaintiff has not identified a substantial limitation in any major life activity, as a matter of law she cannot prove her prima facie case because she cannot establish that she had a disability as defined by the ADA or the Rehabilitation Act. The court grants defendant's motion for summary judgment as to plaintiff's claim that she was discriminated against on the basis of her disability.

IV. RETALIATION

In her complaint, plaintiff also alleged that her termination was in retaliation for protected activity, including the "grievance" she filed on April 24, 1995, and her complaints with the Agency's EEO officers on May 8 and May 22, 1995. To establish a prima facie case of

retaliation, plaintiff must establish that 1) she engaged in protected activity; 2) suffered an adverse action; and 3) that a causal link exists between the two. *Roth v. Lutheran General Hospital*; 57 F.3d 1446, 1459 (7th Cir. 1995). If plaintiff establishes these elements, the Agency must provide a legitimate, nonretaliatory reason for the action it took. *Id.* Plaintiff must then rebut this proffered reason and establish that a retaliatory intent was actually the motivating factor for the action. *Id.*

The Agency maintains that plaintiff cannot prove her prima facie case because there was no causal link between her EEO complaint and her termination, and she therefore cannot establish that the Agency would not have taken the adverse action "but for" the protected activity. *McKenzie v. Illinois Dept. of Transp.*, 92 F.3d 473, 483 (7th Cir. 1996). It states that at the time her termination was proposed, on May 24, 1995, Sandra Slayton, the proposing official, had no knowledge of the plaintiff's EEO complaint. The Agency also claims that even if plaintiff could establish a prima facie case of retaliation, she cannot refute the legitimate, nonretaliatory reason that defendant has established: she was AWOL for 400 hours and did not provide adequate medical documentation for her absence.

Plaintiff responds that although Fruge and Slayton may not have been aware of plaintiff's EEO charge until after Slayton initiated the proposal to terminate, they were aware of plaintiff's April 24, 1995, grievance. She also claims that McGill-Yearby and Fruge became aware of the EEO charges before the final decision to terminate her on June 26, 1995. As to defendant's claim that it terminated plaintiff because she failed to provide adequate medical documentation of her condition,

plaintiff asserts that the medical notes from Drs. Canton and Kaplan were sufficient and timely and that this reason for termination was therefore pretextual.

Although informal complaints to a supervisor-as well as formal charges with the EEOC-certainly constitutes a protected activity, the court finds that plaintiff's April 24, 1995, letter to the Agency did not constitute a "grievance" or amount to protected activity. *Maldonado v. Metra,* 743 F.Supp. 563, 568 (N.D.Ill. 1990) (employee complained about possible hiring discrimination against minorities); *Kastel v. Winnetka Board of Education,* 946 F.Supp. 1329, 1339 (N.D.Ill. 1996) (employee warned that she would file charges for age and sex discrimination). The Agency cites *Barber v. CSX Distribution Services,* 68 F.3d 694 (3rd Cir. 1995), as support for its contention that not all complaints to supervisors amount to protected activity. After failing to receive a promotion, the plaintiff in *Barber* sent a letter to his company's human resources department that stated he was "puzzled as to why the position was awarded to a less qualified individual." *Id.* at 697. The court held that this letter did not constitute protected activity because it was "just too vague." Although it was clear from the letter that Barber felt he had been treated unfairly, the letter did not explicitly or implicitly allege that age was the reason for the unfair treatment. *Id.* at 702.

Here, plaintiff sent the letter in response to her supervisors' request for additional documentation of plaintiff's medical condition. In it, she stated that she was requesting leave without pay for four reasons, one of which was "discrimination." The letter lists plaintiff's dissatisfaction with her workplace and supervisors

but does not indicate that she felt their requiring her to submit medical documentation was discrimination based on her disability. Unlike the informal complaints described in *Maldonado* and *Kastel,* plaintiff's letter did not put her supervisors on notice that she was complaining about discrimination prohibited by Title VII or the ADA.[5] It is simply too vague in its mention of "discrimination" to constitute protected activity.

As a result, the first time plaintiff engaged in protected expression was on May 8, 1995, when she contacted Travis Jones, the local EEO officer, and again on May 17 and 22, 1995, when she spoke with and subsequently mailed a letter to Mike Sherman, an employee at the Office of Civil Rights Enforcement in Kansas City. The process of terminating plaintiff began May 24, 1995, when Slayton sent plaintiff official notification of the Agency's intent to remove her from her position for excessive absence without leave.[6] As of that date, the decisionmakers in plaintiff's termination were not yet aware of her EEO complaints. Jones played no role in the decision to terminate plaintiff and stated that he informed no one else in the office of plaintiff's informal complaint to him. Therefore, the first time the decisionmakers heard of plaintiff's complaints to the EEO office was May 26, 1995, when Sherman notified Fruge of

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[5] In fact, plaintiff complained of events at work that occurred before she experienced depression, including the denial of her March 1994 transfer request and the shortness of staff in 1992 and 1993. This makes the tie between her complaint of "discrimination" and her disability even more tenuous.

[6] Slayton also warned plaintiff in her May 1, 1995, letter that failure to provide appropriate medical documentation could lead to disciplinary action up to and including removal.

plaintiff's May 17 and 22 complaints. This sequence of events establishes that when plaintiff's supervisors learned of her complaints of discrimination, the proposal to terminate her for excessive unauthorized leave had already begun. Although a final decision to terminate was not made until June 30, 1995, "an employer's continued action on decisions made before the protected activity occurred negates causation." *See Limes-Miller v. City of Chicago*, 773 F.Supp. 1130, 1147 (N.D.Ill. 1991); *Davis v. Palmer Dodge West, Inc.*, 977 F.Supp. 917, 925 (S.D.Ind. 1997) (after plaintiff engaged in protected activity, supervisor began "complain(ing) about things he had not complained of before").

Even if plaintiff could establish a causal link between her complaints and her termination, she has not rebutted the Agency's legitimate, nonretaliatory reason for its action: that she had been away from work without leave for 400 hours and refused to provide the additional documentation her employer requested. To avoid summary judgment at this juncture, plaintiff must "present direct evidence that [her] [protected activity] played a role in the company's decision" to terminate her or she must "create a genuine issue as to the sincerity of the proffered reasons for [her] discharge." *Collier v. Budd Co.*, 66 F.3d 886, 892 (7th Cir. 1995). As plaintiff has no direct evidence of an intent to discriminate and defendant has presented evidence of its correspondence with plaintiff in support of its reason for termination, she must show either that: 1) the proffered reason had no basis in fact; 2) the proffered reason did not actually motivate her discharge; or 3) the proffered reason was insufficient to motivate her discharge. *Id.*; *see also Ali v. Brown*, ___ F.Supp. ___ 1998 WL 136227, *9 (N.D.Ill.) (citations omitted).

Plaintiff does not allege that the Agency's requirements were unreasonable, she merely asserts that she met them because the medical notes from Drs. Clanton and Kaplan were sufficient and timely. This is inadequate to rebut the Agency's proffered nonretaliatory reason because it has no factual support in the record. The evidence indicates that on April 13, 1995, Slayton sent a letter to plaintiff informing her that "additional information and clarification regarding your request for extended leave for medical reasons is necessary before any further leave can be granted." She also told plaintiff that Dr. Clanton had not responded to the Agency's request for additional information and that plaintiff was therefore responsible for obtaining a medical certificate from him. The letter specified what information the Agency required and why the letter Dr. Clanton had previously sent was insufficient for granting additional leave. Plaintiff refused to provide the requested information, stating that it was an invasion of privacy. In a May 1, 1995, letter, Slayton again informed plaintiff that additional certification was necessary and explained that without it, plaintiff would be considered AWOL and subject to disciplinary action. Dr. Kaplan did not supply the Agency with additional medical information until June 21, 1995, almost a month after the proposal to terminate.

Plaintiff alleges that Slayton testified that plaintiff's documentation was sufficient, proving that the Agency's request for additional documentation was pretextual. Again, the record does not support this assertion. What Slayton actually stated was that Dr. Carson's letter was sufficient for the initial grant of leave from March 13 to April 13, 1995. Once it became apparent that plaintiff

would not be returning to work at the end of that initial leave, the Agency required more detailed information regarding plaintiff's symptoms and prognosis. It was free to establish rules as to the medical documentation it requires when employees take extended leaves of absence. *See Ali*, ___ F.Supp. at ___ 1998 WL 136227, *10. Whether or not plaintiff agreed with the Agency's policy concerning medical documentation or agreed with its assessment that she had not yet complied is irrelevant where the Agency notified her that she was not in compliance and she does not complain that similarly situated employees were not required to submit such documentation. *See, e.g., Thomas-Hollis v. Armour Swift Eckrich, Inc.*, 1998 WL 42324, *2 (N.D.Ill.).

For these reasons, the court grants defendant's motion for summary judgment as to plaintiff's claim that she was retaliated for engaging in protected activity.

V. MSPB DECISION

Finally, as to plaintiff's appeal of the MSPB decision,[7] defendant claims that it is entitled to summary judg-

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[7] Although the Court of Appeals for the Federal Circuit has sole jurisdiction over MSPB appeals, federal district courts may retain jurisdiction over cases involving such an appeal if the complaint also contains related claims for employment discrimination. 5 U.S.C. § 7703(b)(1); *Randle v. Bentsen*, 19 F.3d 371, 374 (7th Cir. 1994). Although the court has disposed of plaintiff's discrimination claims, in the interests of judicial economy it may still retain jurisdiction over the MSPB appeal because the discrimination claim in the original complaint was not a "jurisdictional charade." *Afifi v. United States Dept. of Interior*, 924 F.2d 61, 62-63 (4th Cir. 1991) (cited with approval in *Randle, supra* at 374, fn.2).

ment because plaintiff cannot establish that the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 7703(c)(1). To prove an AWOL charge in a MSPB hearing, the Agency must establish by a preponderance of the evidence that the requests for leave were properly denied. 5 C.F.R. § 1201.56(a); *Staten v. United States Postal Service,* 26 M.S.P.R. 206, 208 (1985). In response, plaintiff "adopts each of the arguments raised above," again stating that her submitted medical documentation was sufficient.

Alter a hearing on the merits, the administrative judge held that plaintiff's claim of "psychological inability to return to work" was insufficient because "mere presence of job tensions will not justify AWOL" and her medical documentation did not establish that she could not work during this period. As to plaintiff's claim that the medical documentation she submitted was indeed sufficient to justify her absence, the judge also disagreed. Instead, he found that Dr. Clanton had treated plaintiff only once, more than a month before her AWOL period and that Dr. Kaplan had not seen plaintiff until after the Agency proposed her removal. Their brief letters contained "little, if any, reasoning supporting their opinions or describing how the appellant's condition prevented her from performing her duties."

Because the court finds that the administrative judge's decision was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law" and for the reasons stated above as to plaintiff's claim that her medical documentation was sufficient, it grants defendant's motion for summary judgment as to

Count III, plaintiff's claim to reverse the decision of the MSPB.

ORDERED: For the foregoing reasons, the court grants defendant's motion for summary judgment.

ENTER:

"/s/ George W. Lindberg"
George W. Lindberg
United States District Judge

DATED: June 9, 1998